

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

ANTHONY LEE TOLIVER,	)	No. CV-F-05-694 OWW
	)	(No. CR-F-99-5269 OWW)
	)	
Petitioner,	)	MEMORANDUM DECISION AND
	)	ORDER DENYING PETITIONER
vs.	)	TOLIVER'S MOTION TO VACATE,
	)	SET ASIDE OR CORRECT
	)	SENTENCE PURSUANT TO 28
UNITED STATES OF AMERICA,	)	U.S.C. § 2255 AND DIRECTING
	)	ENTRY OF JUDGMENT FOR
	)	RESPONDENT
Respondent.	)	
	)	
	)	

On June 1, 2005, Petitioner Anthony Lee Toliver filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

Petitioner asserts that his sentence is unconstitutional because it was based on facts not found by the jury beyond a reasonable doubt in violation of the Sixth Amendment and, because the jury did not determine any specific amount of powder cocained involved in the conspiracy, the Court had no basis to impose any sentence on Petitioner.

Petitioner's motion is DENIED. Petitioner's claims were addressed by the Ninth Circuit on direct appeal and denied. See *United States v. Toliver*, 351 F.3d 423 (9th Cir.2003), cert. denied, 541 U.S. 1079 (2004). To the extent Petitioner bases his Section 2255 motion on *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), Plaintiff's claims are without merit. Neither *Blakely* nor *Booker* are retroactive to cases on collateral review. *Schardt v. Payne*, 414 F.3d 1025 (9<sup>th</sup> Cir.2005); *United States v. Cruz*, 423 F.3d 1119 (9<sup>th</sup> Cir.2005), cert. denied, 546 U.S. 1155 (2006).

For the reasons stated:

1. Petitioner Anthony Lee Toliver's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 is DENIED.

2. The Clerk of the Court is directed to enter JUDGMENT FOR RESPONDENT.

IT IS SO ORDERED.

Dated: August 1, 2008

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE